PD-1359-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/23/2018 3:55 PM
Accepted 4/23/2018 4:06 PM
DEANA WILLIAMSON
CLERK

No. PD-1359-17

FILED
COURT OF CRIMINAL APPEALS
4/23/2018
DEANA WILLIAMSON, CLERK

In the Court of Criminal Appeals of Texas

SANDRA COY BRIGGS,
Appellant—Respondent
v.
THE STATE OF TEXAS,
Appellee—Petitioner

State's Brief on Petition for Discretionary Review
from the Thirteenth Court of Appeals, Corpus Christi—Edinburg, Texas
No. 13-15-00147-CR

NICHOLAS "NICO" LaHOOD
Criminal District Attorney
Bexar County, Texas

JENNIFER ROSSMEIER BROWN
Assistant Criminal District Attorney
Bexar County, Texas

NATHAN MOREY
Assistant Criminal District Attorney
Bexar County, Texas

ENRICO B. VALDEZ
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva
San Antonio, Texas 78205
(210) 335-2379
State Bar No. 00797589
ricov@bexar.org

Attorneys for the State of Texas

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge who presided over the original plea was the **Honorable Maria Teresa Herr** then Presiding Judge of the 186th Judicial District Court, Bexar County, Texas, and the judge who presided over the motion for new trial was the **Honorable Jefferson Moore**, Presiding Judge of the 186th Judicial District Court, Bexar County.

The parties to this case are as follows:

1) **Sandra Coy Briggs** was the defendant in the trial court and Briggs in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Sandra Coy Briggs was represented at the time of her original plea by **Edward Piker**, State Bar No. 16008800, 315 S. Main Ave, San Antonio, TX 78204, and on her motion for new trial by **Dayna L. Jones**, State Bar No. 24049450, 1800 McCullough Ave, San Antonio, TX 78212.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, **Tamara Strauch**, **Charles Rich**, **David Henderson**, and **Nathan Morey**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys to the Thirteenth Court of Appeals were as follows:

1) Sandra Coy Briggs was represented by **Dayna L. Jones**, State Bar No. 24049450, 1800 McCullough Ave, San Antonio, TX 78212.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, **Jennifer Rossmeier Brown**, Assistant District Attorney, and **Enrico B. Valdez**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

The State of Texas is represented in this petition by **Nicholas "Nico" LaHood**, District Attorney, **Jennifer Rossmeier Brown, Nathan Morey**, and **Enrico B. Valdez**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF THE CASE

Sandra Coy Briggs was indicted on one count of intoxication manslaughter resulting in the death of San Antonio Police Department officer Sergio Antillon. (1 CR at 4) Briggs pled "no contest" on January 13, 2012 and a jury assessed her punishment at imprisonment for forty-five (45) years in the Texas Department of Criminal Justice, Institutional Division on January 20, 2012. (1 CR at 20, 144, 151, 108–09).

STATEMENT OF PROCEDURAL HISTORY

Briggs did not initially pursue an appeal of her conviction and sentence. In 2014, Briggs filed an application for a writ of habeas corpus alleging ineffective assistance of counsel for failure to file an appeal and this Court granted Briggs an out-of-time appeal. *Ex parte Briggs*, No. WR-82,035-01, 2014 Tex. Crim. App. Unpub. LEXIS 787, at *1 (Tex. Crim. App. Sep. 24, 2014). Briggs subsequently filed both an out-of-time motion for new trial and an out-of-time appeal. (1 CR at 123–35, 149) After a hearing, the trial court denied Briggs's out-of-time motion for new trial on February 20, 2015. (1 CR at 148)

In a published opinion, a three judge panel of the Thirteenth Court of Appeals concluded that Briggs's original trial counsel "misrepresented the law to Briggs as it relates to the admissibility of her blood-draw evidence" rendering her plea involuntary. *Briggs v. State*, No. 13-15-00147-CR, 2017 Tex. App. LEXIS

1947, at *23 (Tex. App.—Corpus Christi, March 9, 2017). The Thirteenth Court of Appeals reversed Briggs's conviction and the trial court remanding the case for a new trial.

The State filed a motion for rehearing en banc and on November 21, 2017, the Thirteenth Court of Appeals granted the motion and withdrew its original opinion. *Briggs v. State*, 536 S.W.3d 592, 594 (Tex. App.—Corpus Christi 2017, pet. granted) (en banc). Despite granting the motion, the Thirteenth Court of Appeals still found that Briggs's trial counsel misrepresented the law to her making her plea involuntary and reversed the conviction and remanded the case for a new trial. *Id*. at 604–05. Two justices, agreeing with the State's position in the motion for rehearing, dissented. *Id*. at 605 (Contreras, J., dissenting).

On December 22, 2017, the State filed a petition for discretionary review. On March 21, 2017, granted the State's petition and the State's brief is due on April 20, 2018. This brief is filed contemporaneously with a motion to extend the filing deadline.

GROUND FOR REVIEW

Whether the Court of Appeals erred in concluding that trial counsel's advice was a misrepresentation of the law that rendered Briggs's plea involuntary, when the advice was based on the controlling precedent that existed at the time counsel's advice was given?

RELEVANT PORTIONS OF THE RECORD

Briggs entered a plea of "no contest" to the charge of intoxication manslaughter on January 13, 2012. (3 RR at 14) The trial court found the plea to be voluntary and pronounced a forty-five (45) year sentence in accordance with a jury verdict on January 20, 2012. (1 CR at 24, 3 RR at 6–12, and 8 RR at 147–48) Briggs did not pursue an appeal.

On September 24, 2014, this Court granted habeas relief based on the trial court's findings that Briggs's trial counsel failed to perfect an appeal. (1 Supp. CR at 3–5); *Ex parte Briggs*, No. WR-82,035-01, 2014 Tex. Crim. App. Unpub. LEXIS 787, at *1 (Tex. Crim. App. Sep. 24, 2014). In granting relief, this Court ordered that "[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues." *Id.* at *2.

On January 8, 2015, Briggs filed and presented a motion for new trial. (1 CR at 122–23). In her first ground for relief in the motion, Briggs asked the trial court to grant her a new trial on the basis of an involuntary plea. (1 CR at 127–32). In her second ground for relief, Briggs asked the trial court to grant her a new

punishment hearing. (1 CR at 32–34). Briggs relied primarily on the Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013)—decided more than a year after she was sentenced—and the subsequent decisions from this Court and the courts of appeals applying *McNeely* to searches conducted pursuant to section 724.012(b) of the Texas Transportation Code.

At the hearing on the motion for new trial, both Briggs and her original trial counsel, Ed Piker, testified. The Thirteenth Court's panel summarized Piker's testimony as follows:

> Piker testified that they considered a number of ways to challenge the admission of the blood evidence, but were unable to come up with an approach that would form the basis for a motion to suppress or that would keep the evidence out at trial. Instead, based on Piker's understanding of the law at the time—that a mandatory blood draw without the necessity of a warrant was proper in the event of serious bodily injury or death resulting from an accident—they decided Piker would not file a motion to suppress and Briggs would plead no contest and would allow a jury to assess punishment.

Briggs v. State, 536 S.W.3d at 596. The opinion also summarized Briggs's testimony thusly: "Briggs testified that she discussed the matter with Piker and was aware that the blood evidence would be problematic if she went to trial. She believed that the trial court would admit her blood evidence at trial, and if there had been a way to keep it from being used against her at trial, she would have wanted a trial." *Id*.

SUMMARY OF THE ARGUMENT

The court of appeals erred in concluding that trial counsel's advice was a misrepresentation of the law that rendered Briggs's plea involuntary, when the advice was based on the controlling precedent that existed at the time counsel's advice was given.

ARGUMENT

To be consistent with due process of law, a guilty plea must be entered knowingly, intelligently, and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). To be "voluntary," a guilty plea must be the expression of the accused's own will and not induced by threats, misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Kniatt*, 206 S.W.3d at 664. And a plea of guilty should not be accepted by the trial court unless it appears that it is voluntary. *See Holland v. State*, 761 S.W.2d 307, 320 (Tex. Crim. App. 1988).

The inaccurate advice of counsel can render a plea involuntary. When a defendant pleads guilty based on the erroneous advice of his counsel, the plea is not knowingly and voluntarily made. *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). That is, a guilty plea will not support a conviction where the plea is motivated by significant misinformation conveyed by defense counsel. *Ex parte Kelly*, 676 S.W.2d 132, 134-35 (Tex. Crim. App. 1984); *Rivera v. State*, 952 S.W.2d 34, 36 (Tex. App.—San Antonio 1997, no pet.).

The majority of the en banc panel concluded that Briggs' plea was involuntary because counsel "misrepresented" the law to her at the time her plea was entered. *Briggs*, 536 S.W.3d at 604. An examination of the record, however, reveals that counsel did not misrepresent the law and his advice was based on an accurate summation of the law as it exited at the time.

Briggs pleaded "no contest" to the offense of intoxication manslaughter in January of 2012. The controlling precedent from this Court in effect at that time held that a warrantless blood-draw conducted pursuant to Chapter 724 of the Texas Transportation Code—Texas's implied consent statute—did not violate the Fourth Amendment. *See Beeman v. State*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002) ("The implied consent statute does that—it implies a suspect's consent to a search in certain instances. This is important when there is no search warrant, since it is another method of conducting a *constitutionally valid search*." (emphasis added)); *see also State v. Johnson*, 336 S.W.3d 649, 661 (Tex. Crim. App. 2011). This precedent was followed by the Fourth Court of Appeals until the summer of 2014. *See Aviles v. State*, 385 S.W.3d 110, 116 (Tex. App.—San Antonio, 2012 pet. ref'd), *vacated and remanded Aviles v. Texas*, 134 S.Ct. 902 (2014), *on remand Aviles v. State*, 443 S.W.3d 291 (Tex. App.—San Antonio 2014). Thus, it is not disputable that Piker's advice to Briggs was based on an accurate evaluation of the law at the time the advice was given.

Despite this, the court of appeals' majority retroactively applied *Missouri v. McNeely*, 569 U.S. 141 (2013) and its progeny, *State v. Villareal*, 475 S.W.3d 784 (2015) (op. on reh'g), to assess counsel's advice and to reach its conclusion that Piker misinformed Briggs, rendering her plea involuntary. Thus, the main issue in this case is whether counsel's advice to Briggs can properly be characterized as a "misrepresentation" that rendered her plea involuntary when the advice was based on the controlling precedent that existed at the time his advice was given. Even assuming the panel was correct in concluding that *McNeely* and *Villareal* applied retroactively to Briggs's out-of-time appeal, the relevant authority from the United States Supreme Court and this Court do not support the court's conclusion that counsel's advice to his client must be assessed based on law that did not exist at the time advice was given.

In the State's original brief, in argument, and in the motion for rehearing, the State directed the court of appeals to the Supreme Court's opinion in *Brady v. United States*, 397 U.S. 742 (1970). The majority did not substantively address this authority in its opinion.[1] At issue in *Brady* was trial counsel's advice that he could be subjected to the death penalty if he went to trial. *Id*. at 748. Based on that advice, Brady pleaded guilty. *Id*. Subsequently, the death penalty statute was declared unconstitutional in *United States v. Jackson*. *Id*. In rejecting Brady's

[1] The en banc majority's only acknowledgment of *Brady v. United States* or *McMann v. Richardson* is contained in footnote 6. *Briggs*, 536 S.W.3d at 599 n.6.

contention that his plea was involuntary, the Supreme Court explained that a "plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered." *Id*. at 757. According to the Court:

> The fact that Brady did not anticipate *United States v. Jackson*, *supra*, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. Simply put, a subsequent change in the law does not invalidate an earlier plea.

Nor is *Brady* the only opinion in which the Supreme Court has addressed this issue. In *McMann v. Richardson*, the Supreme Court explicitly stated that the fact that "a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." 397 U.S. 759, 773 (1970). At issue in *McMann* was a guilty plea that was based on the belief that the defendant's confession would be admissible at trial. *Id*. at 769, 771–72. Subsequent to the entry of the guilty plea,

the Supreme Court decided *Jackson v. Denno*[2] which, if it had been decided before the entry of the plea, would have affected the admissibility of the confession. *Id*. at 766. Because of this new opinion, the defendant sought to have his plea set aside essentially arguing "that the admissibility of his confession was mistakenly assessed and that … his plea was [therefore] an unintelligent and voidable act." *Id*. at 769.

In rejecting the argument, the Court reasoned that when a "defendant waives his state court remedies and admits his guilt, **he does so under the law then existing**; further, he assumes the risk [of] ordinary error in either his or her attorney's assessment of the law and facts." *Id*. at 774 (emphasis added). According to the Court, "[a]lthough he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove a serious dereliction on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *Id*. at 774.

The Supreme Court continues to accept and apply the holdings in both *Brady* and *McMann*. *See e.g.*, *United States v. Ruiz*, 536 U.S. 622, 630–31 (2002) ("[T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its

[2] 378 U.S. 368 (1974).

accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.") (citing *Brady*, at 757; *McMann*, at 770; *United States v. Broce*, 488 U.S. 563, 573 (1989); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Additionally, this Court has relied on these opinions as controlling precedent. *See Ex parte Palmberg*, 491 S.W.3d 804, 807–08 (Tex. Crim. App. 2016); *Ex parte Chandler*, 182 S.W.3d 350, 359–60 (Tex. Crim. App. 2005). As this Court has recognized, "every defendant who enters a guilty plea does so with a proverbial role of the dice." *Palmberg*, 491 S.W.3d at 809.

It is also worth noting, as the dissent does in this case,[3] that the above case law is consistent with cases evaluating the effective assistance of counsel under the Sixth Amendment. When evaluating counsel's performance, the reviewing court looks to the law in effect at the time of representation and not at subsequent changes in the law. *See Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) (citing *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996). As this Court has noted, "legal advice which only later proves to be incorrect does not normally fall below the objective standard of reasonableness under *Strickland*." *Ex parte Chandler*, 182 S.W.3d 350, 359 (Tex. Crim. App. 2005) (citing *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999); *United States v. McNamara*, 74

[3] *See Briggs v. State*, 536 S.W.3d 609–10 (Contreras, J., dissenting).

F.3d 514, 516-17 (4th Cir. 1996); *Pitts v. Cook*, 923 F.2d 1568, 1573-74 (11th Cir. 1991); *Honeycutt v. Mahoney*, 698 F.2d 213, 217 (4th Cir. 1983); *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972)).

Along this line, in *McNeely*, the Supreme Court noted that it was motivated to grant certiorari in order to resolve a split of authority among state courts as to whether a DWI arrest presented a *per se* exigency to a police officer. *McNeely*, 569 U.S. at 148. In this respect, Piker's advice did not offend the Sixth Amendment because his understanding of DWI blood draws was shared by multiple high courts throughout the nation. *See id*. at 148 n.2 (acknowledging that the supreme courts of Minnesota, Wisconsin, and Idaho concluded that the "natural dissipation of blood-alcohol evidence alone constitutes a *per se* exigency"); *Ex parte Chandler*, 182 S.W.3d at 359 (reasoning that Chandler's lawyer could not have given deficient advice on his ineligibility for probation because a Texas appellate court had recently arrived at the same legal conclusion).

Based on this case law, it is clear that the majority's opinion in this case erred in evaluating Piker's advice at the time the plea was entered in light of subsequent changes in the law. The controlling precedent that existed at the time the advice was given was that a blood-draw conducted pursuant to Texas's implied consent statute did not require a warrant and did not violate the Fourth Amendment. *See Pesina v. State*, 676 S.W.2d 122, 124 (Tex. Crim. App. 1984)

(citing to *Schmerber* for the proposition "consent to obtain a blood sample is not constitutionally required when an accused is under arrest"); *Stidman v. State*, 981 S.W2d 227, 228–29 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (blood draw based on section 724.012(b) did not violate Fourth Amendment); *Beeman*, 86 S.W.3d at 616 ("The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant." (emphasis added); *Aviles*, 385 S.W.3d at 116 (warrantless blood draw pursuant to section 724.012(b) did not violate Fourth Amendment).

Simply put, the Constitution requires the advice of competent counsel, not clairvoyant counsel. The Thirteenth Court of Appeals erred in concluding that Piker "misrepresented" the law to Briggs in 2012. Accordingly, the trial court's denial of Briggs's motion for new trial was proper.

PRAYER

The State prays that this Honorable Court reverse the court of appeals and reinstate the judgment of the trial court.

Respectfully submitted,

NICHOLAS "NICO" LAHOOD
Criminal District Attorney
Bexar County, Texas

JENNIFER ROSSMEIER BROWN
Assistant Criminal District Attorney

NATHAN MOREY
Assistant Criminal District Attorney

/s/ *Enrico B. Valdez*
ENRICO B. VALDEZ
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva, Seventh Floor
San Antonio, Texas 78205-3030
(210) 335-2379
(210) 335-2436 (fax)
State Bar No. 00797589
(On Appeal)

Attorneys for the State

CERTIFICATE OF COMPLIANCE

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify, in accordance with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure that this document contains 3,998 words.

/s/ Enrico B. Valdez
ENRICO B. VALDEZ

CERTIFICATE OF SERVICE

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify that a copy of the foregoing brief will be provided to Dayna L. Jones, Attorney for the Briggs, 1800 McCullough Avenue, San Antonio, Texas 78212, and to the State Prosecuting Attorney on this the 23rd day of December, 2018.

/s/ Enrico B. Valdez
ENRICO B. VALDEZ